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No. 88-2113

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

DARRELL JOHNSON,
Petitioner,

VS.

VINCENT WILLIAMS-EL,
Respondent.

PETITIONER'S REPLY BRIEF

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1. Petitioner has presented the Court with the following question: "Whether the doctrine of *Parratt v. Taylor* is applicable to the random and unauthorized punishment of a pretrial detainee." Petition, p. 1. However, as petitioner explained, the resolution of that question requires, as a matter of logic, the resolution of three subsidiary questions: a) whether *Parratt* applies to liberty interests as well as property interests; b) whether *Parratt* applies to substantive due process as well as procedural due process; and c) whether the punishment of pretrial detainees implicates substantive due process or procedural due process. Petition, pp. 4-12. Indeed, petitioner believes that one of the virtues of his petition is that resolution of the question presented not only permits but requires resolution of the three subsidiary questions, each an important and unresolved question of federal law. Yet respondent argues that this Court is without jurisdiction to consider and resolve the

subsidiary question of whether *Parratt* is applicable to liberty interests and he argues that petitioner cannot challenge the Eighth Circuit's holding that it is. Respondent misunderstands both petitioner's position and this Court's jurisdiction.

First, petitioner does not challenge the Eighth Circuit's holding that *Parratt* is applicable to liberty interests; petitioner agrees that it is; indeed, petitioner's position that the *Parratt* doctrine is applicable to pretrial detainees requires acceptance of the Eighth Circuit's holding in that respect. Second, the Court has jurisdiction to determine any question essential to the analysis of the decision below, *United States v. Mendenhall,* 446 U.S. 544, 551 n.5 (1980), and determination of whether or not *Parratt* is applicable to liberty interests is essential to the analysis of whether the Eighth Circuit properly decided that *Parratt* is inapplicable to detainees.

2. Respondent next argues that the question of whether the punishment of pretrial detainees implicates procedural due process or substantive due process is settled and that it is settled that such punishment implicates substantive due process. Respondent first relies on what he believes are implications in this Court's opinions in *Bell v. Wolfish,* 441 U.S. 520 (1979) and *United States v. Salerno,* 481 U.S. 739 (1987). However, as petitioner has already argued, the *Bell v. Wolfish* court's reliance on *Kennedy v. Mendoza-Martinez,* 372 U.S. 144 (1963) suggests the opposite implication from that which respondent seeks to draw. Petition, p. 10. And, in *Salerno,* the most that the Court's opinion can be fairly read to show is that the Court accepted the proposition arguendo.

Respondent next relies on a miscellany of older district court and court of appeals opinions that have treated the rights of pretrial detainees as the same as those that prisoners enjoy under the Eighth Amendment. This error, which is identical with that committed by the court below in this case, is akin to that condemned in *Graham v. Connor,* 490 U.S. ____, 104

L.Ed.2d 443, 109 S.Ct. ____ (1989). That this error continues to be committed in the wake of *Graham* demonstrates that this question is unsettled and ought to be decided by this Court.

Respectfully submitted,

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